United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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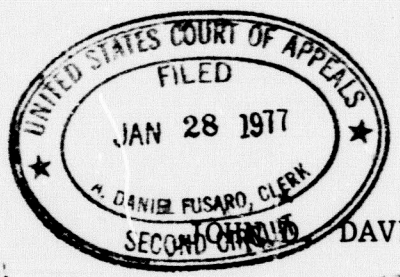
UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



JOHN D. DAVIS,

Plaintiff-Appellant,

-against-

RJR FOODS, INC.,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR JOHN D. DAVIS,
PLAINTIFF-APPELLANT

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CITATIONS

Statutes:

Age Discrimination in Employment Act of December 6, 1967, Pub. L. 90-202, 81 Stat. 602, as amended:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOHN D. DAVIS, :

Plaintiff-Appellant, :

-against- :

RJR FOODS, INC., :

Defendant-Respondent. :

----------x

BRIEF FOR JOHN D. DAVIS,
PLAINTIFF-APPELLANT

STATEMENT OF THE CASE

This appeal is from an order dismissing, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, a discrimination suit brought by John D. Davis against his former employer, RJR Foods, Inc., under 7c of the Age Discrimination in Employment Act of 1967 (hereafter, the ADEA or the Act).[1] Davis sought reinstatement, plus all benefits, lost wages and retirement benefits resulting from his allegedly unlawful discharge or, in the alternative, if not reinstatement, compensatory and punitive damages, together with at-

1. Act of December 6, 1967, P.L. 90-202, 81 Stat. 602, as amended; 29 U.S.C. 621, et seq. Subsection (b) of Section 7 incorporates by reference the civil enforcement provisions of the Fair Labor Standards Act (Act of June 25, 1938, C. 676, 52 Stat. 1060, as amended; 29 U.S.C. 201, et seq.), includes Section 16B of that act [29 U.S.C. 216(b)] , which provides for the bringing of private actions by aggrieved employees. The pertinent statutory provisions are set forth infra, pp. 2-5.

torney's fees and costs. In dismissing the complaint, the district court held that it lacked subject matter jurisdiction because plaintiff had not strictly complied with the procedural timetable set out in Section 7(d)(1) of the ADEA, in that he had failed to notify the Secretary of Labor of his intent to file suit within one hundred and eighty days after the alleged unlawful practice occurred. Although Section 7(e) specifically establishes the statutory period for instituting suit under the ADEA, two years after the cause of action accrues or, in the event of a willful violation, three years from that date, the court ruled that the notice provision in Section 7(d) constitutes a further restriction on the individual's right of action, and that plaintiff's untimely filing of such notice barred him from bringing suit against his former employee.

It also held that plaintiff had failed to timely institute within 300 days of the claimed unlawful discharge, appropriate state proceedings under the New York Human Rights Law, Section 296 (McKinney's Executive Law 1975).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act, supra, provides in pertinent part as follows:

> SEC. 7(b). The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Stand :ds

Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

SEC. 7(c). Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

SEC. 7(d). No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed --

(1) within one hundred and eighty days after the alleged unlawful practice occurred ***.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

SEC. 7(e). Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

The Fair Labor Standards Act, supra, provides in pertinent part, as follows:

SEC. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

The Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C. 251 et seq. provides in pertinent part as follows:

> SEC. 6 STATUTE OF LIMITATIONS. -- Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, *** --
>
> (a) if the cause of action accrues on or after the date of the enactment of this Act -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; *** .

STATEMENT OF FACTS

Plaintiff was hired by defendant in 1968 as a Brand Director for 2 lines, i.e., Vermont Maid Syrup and Davis Baking Powder, (Complaint, para. 8, App.A-6), under a 3 year bonus contract expiring December 31, 1971 which was renewed on different and better conditions for a term commencing January 1, 1971 and terminating December 31, 1973 (Complaint, para. 9, App.A6). Additional benefits included hospitalization, major medical insurance for himself and his family, term life insurance, college scholarships for his children, vacation and retirement plan, physical examinations and participation payroll savings plan (Complaint, para. 11, App.A-7).

He was an executive with full authority over each of the lines

and had an annual budget of $8,000,000.00 at his disposal (Complaint, para. 7, App.A-6).

In the spring of 1972 he met the established corporate policy of bottom-line profitability and development of new products (Complaint, para. 14-15, App. A-8). At that time, one Frantz was elected vice-president for Marketing (Complaint, para. 16, App.A-8). Frantz admitted that plaintiff performed his executive functions properly, but at the same time derided the plaintiff, said he was too old, called him "Pop", and in addition, stated that plaintiff was overqualified for his position (Complaint, para. 17, App.A9).

On or about June 6, 1972, plaintiff was told that his services were terminated as of October 6, 1972, but that he was to physically vacate his office at the end of that week (Complaint, para. 18, App.A-10).He was replaced by a man under the age of 40 years (Complaint, para. 19, App.A-10).Simultaneously with plaintiff, six other executives over the age of 40 years were replaced by men under 40 years of age (Complaint, para 20, App. A-10). Other executives over 40 were demoted or reduced in responsibilities or had their salaries reduced (Complaint, para. 21-22, App. A-11).

RJR's letter evidenced continuation of employment to October 6, 1972, when Davis was to be terminated (Affidavit of John D. Davis, App. A-46; Letter dated June 12, 1972, App. A-53). By contract dated April 2, 1973, or 178 days after the termination of his employment with defendant, he was employed

by Dancer-Fitzgerald-Sample, Inc., to commence work on April 16, 1973, 192 days after October 6, 1972 (Affidavit of John D. Davis, App.A65).

Plaintiff claimed that his employment by Dancer, an advertising agency retained by defendant, was an attempt to lull him into a false sense of security and thus deprive him of his rights. For it was in this period of employment by Dancer, the captive agency of defendant, that both the 180 day limitation and the 300 day limitation expired (Affidavit of John D. Davis, App.A66). Plaintiff claimed that his employment by Dancer in this period was a deliberate act and indeed was deliberately timed by defendant with its own advertising agency.

On June 27, 1974, after the termination of his employment by Dancer, plaintiff filed a complaint of illegal and willful discharge under the New York City Office of the Department of Labor (Complaint, para. 24, App.A28).

One of defendant's executives (Shrewsbury) told plaintiff that when defendant moved its New York office to Winston-Salem, North Carolina, it transferred only those executives under 40 years of age and had no room for executive personnel over the age of 40 years (Complaint, para. 25, App.A29). Because of such move, the Labor Department in New York delayed in processing plaintiff's complaint until it forwarded the file to its Greensboro, North Carolina office (Complaint, para. 26, App.A29).

The Department of Labor's investigation lasted approximately 16 months (Complaint, para. 26, App. A29). Because plaintiff's complaint to the Department alleged a willful violation, the defendant requested the Department of Labor to grant a 30 day extension to review the charge (Complaint, para. 27, App. A29).

The Department's investigation revealed that it considered October 6, 1972 and not June 6, 1972, as the termination date of his employment (Complaint, para. 28, App. A28). Several internal reports of the Department, made during the course of its investigation, indicated willful discharge on defendant's part (Complaint, para. 29-30, App. A30).

Because plaintiff was not advised of the conclusion of the Department of Labor's investigation and report, he filed his complaint herein on October 2, 1975, within 3 years of his willful discharge on October 6, 1972. He then filed an amended complaint, as of course, on October 8, 1975 and sent a copy of the complaint to the Secretary of Labor on October 9, 1975 (Exhibit 1-A, annexed to Affidavit dated February 28, 1976, App. A52).

The Department of Labor's investigation had been ongoing from June 27, 1974, the date of plaintiff's complaint to it, until October 1, 1975. That was why no action was taken by him on his claim of willful discharge in the interim (Affidavit of February 28, 1976, para. 12, App. A50).

Plaintiff claimed that because of the Department's failure to conclude its preliminary processing for more than 16 months, and the defendant's recognition of the applicability of the 3 year statute of limitations, his filing of the complaint in the federal court on October 2, 1975 preserved his rights, and the service of the amended complaint on the Secretary of Labor on October 9, 1975, gave the Secretary such notice of the litigation, as the Secretary's delayed investigation permitted him to give (Affidavit dated February 28, 1976, para 14, App.A30).

Prior to plaintiff's complaint to the Department on June 27, 1974, the Regional Solicitor of the Department was of the opinion that the complaint was timely (Affidavit dated February 28, 1976, para. 19, App. A46).

Plaintiff's efforts to obtain information concerning his file during the protracted period of investigation were unsuccessful. He was able to obtain such information only after he filed a petition with the Department of Labor under the Freedom of Information Act (Exhibit D, annexed to Affidavit of February 28, 1976, App. A58).

In the report of the Department of Labor's investigation, Mr. Stewart stated that defendant violated the ADEA and recommended plaintiff's reinstatement. In addition, the Department of Labor's compliance officer, George Barish, wrote to the defendant on July 24, 1974 and stated that defendant retained Davis on its payroll until

October 1972, was given no explanation for his dismissal, even though plaintiff had done an excellent job and was overqualified for his job (Affidavit dated February 28, 1976, para. 24, App.A49).

While the administrative proceedings were still pending and because the 3 year statute of limitations was approaching, plaintiff caused a letter to be written to the Department of Labor's Solicitor (Affidavit dated February 28, 1976, para. 25, App.A49) requesting an appointment to discuss his case. This was after the Department expressed an opinion that it did not favor one to one cases, preferring class actions. Moreover, while the Department thought that possibly a statistical age discriminatory act had taken place, the difficulty in proving willfulness was greater than proving non-willful discharge. However, said the Solicitor, stated that, is indeed willfulness did exist, the 3 year limitation applied to plaintiff (Affidavit dated February 28, 1976, App. A50).

Plaintiff urged on the court that the formalistic demand required to be made by him on the Secretary became meaningless in the light of the failure of the Department of Labor to conclude its investigation for 16 months. This also is equally valid with respect to the 300 day requirement for state action (Affidavit dated February 28, 1976, App. A50).

For these reasons, plaintiff argued before the lower court that prior ro making any decision on defendant's motion to dismiss the

complaint, he be permitted an evidentiary hearing to develop all the facts, such as

(a) the exact date of discharge being October 6, 1972 and not June 6, 1972;

(b) the hiring of plaintiff by Dancer-Fitzgerald;

(c) the suspect and captive relationship of Dancer to defendant;

(d) such hiring being a device to lull plaintiff into a position whereby he would not file any complaint with the Secretary of Labor within 180 days or commence state action in 300 days; and

(e) the recognition by defendant of the applicability of the 3 year statute of limitations to him, in view of its request to grant a 30 day extension; and all other things that in totality meant such hearing would reveal facts supporting his time table of events, as disrupted by defendant's deliberate acts.

The lower court felt that while there was considerable support for the view that the requirement for the filing upon the Secretary of Labor of a notice of intention to sue within 180 days of the discriminatory firing was a statute of limitations that could be tolled, it nevertheless followed that line of cases which held such filing was a jurisdictional prerequisite to file any suit under the ADEA.

It also held that Davis was required initially to pursue his state remedies within 300 days of the firing.

Both these requirements, in the opinion of the district court, were necessary preliminaries not complied with by Davis. The facts of the case did not cause the lower court to relax these limitations by tolling or waiver in the light of equitable considerations warranting a departure from the general rules.

Moreover, the fact that the firing may have been willful, does not extend either of these two time sequences.

In addition, the lower court said that the plaintiff did not allege sufficient facts of his firing by Dancer Fitzgerald, the defendant's captive advertising agency, as part of a plot to extinguish his timely right to sue which warranted an evidentiary hearing, prior to ruling on the motion to dismiss.

ARGUMENT

POINT I

A

THE LOWER COURT ERRED IN DISMISSING THIS CASE FOR LACK OF A TIMELY NOTICE OF INTENT TO SUE, SINCE THE BASIC PURPOSES CONTEMPLATED BY SUCH NOTICE WERE FULLY SATISFIED BY PLAINTIFF'S COMPLAINT TO THE LABOR DEPARTMENT AS A RESULT OF WHICH DEFENDANT WAS PROMPTLY NOTIFIED OF THE ASSERTED ADEA VIOLATION AND GIVEN AN OPPORTUNITY TO SETTLE IT.

We argue,that in this case of willful discharge, the 180 day filing requirement of 7(d) of the ADEA is not a jurisdictional requirement. Rather, it is a statute of limitations which under appropriate circumstances can be tolled. For that reason, it becomes necessary to afford appellant an evidentiary hearing at which he may develop the background and show the equitable considerations necessary for the advancement of his argument.

The lower court denied the request for an evidentiary hearing. We ask this court to grant the same.

The matters sought to be developed at such hearing are set forth at p. 11 , of this brief. If in fact such matters are found on the evidentiary hearing, then the background to support our request for equitable consideration of plaintiff's claim will be manifest. Following from that, this court can then hold that the 180 day requirement is not jurisdictional, but is one of limitation which can be flexibly interpreted, depending upon the equitable circumstances in the background.

On the facts, dismissal of this ADEA action for failure to file a timely "notice of intent to sue" constitutes by far the most illogical application to date of the Act's section 7(d) notice requirement.[2] Here, as we shall show, all of the basic purposes served by such a notice were fully satisfied. Therefore, instead of dismissing this action for lack of a timely notice of intent to sue, the lower court should have accepted plaintiff's complaint to the Labor Department as tolling the 180-day notice requirement and his counsel's subsequent formal notification as curing any procedural defects. Its refusal to do so, we submit, is a meaningless triumph of form over substance inimical to the Act's remedial and humanitarian purposes.

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2. See, e.g., Powell v. Southwestern Bell Telephone Co., 494 F. 2d 485 (C.A. 5, 1974); Law v. United Air Lines, Inc., D. Colo. (Nov. 26, 1974, Civil No. 74-W-107), aff'd, C.A. 10 (Jul. 17, 1975, No. 75-1043); Hiscott v. General Electric Co., 8 FEP 1003, 8 EPD para. 9735 (N.D. Ohio 1974), app. pndg. C.A. 6 (No. 75-1181); Oshiro v. Pan American World Airways, Inc., 378 F.Supp. 80 (D. Haw. 1974); Balc v. United Steel Workers, Local 13263, 6 FEP 624, 6 EPD para. 8948 (W.D. Pa. 1973), aff'd per curiam mem., 503 F.2d 1398 (C.A. 3, 1974); Gebhard v. GAF Corp., 59 F.R.D. 504 (D. D.C. 1973); Burgett v. Cudahy Co., 361 F.Supp. 617 (D. Kan. 1973); Price v. Maryland Casualty Co., 62 F.R.D. 614 (S.D. Miss. 1972); Cochran v. Ortho Pharmaceutical Co., 376 F.Supp. 302 (E.D. La. 1971), app. dismissed C.A. 5(No. 72-1457).

Of these cases, only Powell v. Southwestern Bell Telephone Co., supra, similarly involved a specific age discrimination complaint which was lodged with the U.S. Department of Labor within the 180-day period established by Section 7(d)(1). In refusing to toll the 180-day period in such circumstances, the Powell decision is, in our view, erroneous and should not be followed in this particular respect.

It is settled law that the running of a statutory time limitation will be suspended if "tolling the limitation in a given context is consonant with the legislative scheme" (American Pipe and Construction Co. v. State of Utah, 414 U.S. 538, 558 (1974)). "[T]he basic inquiry is whether congressional purpose is effectuated by tolling * * * in given circumstances" (Burnett v. New York Central Railroad Co., 380 U.S. 424, 427 (1965)). "In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act" (ibid.). "Finally, and perhaps most importantly, [where] the tolling effect [is sought to be] given to any timely prior filings" under a particular act, it is essential that "the prior filing in each case necessarily operated to avoid the evil against which the [time limitation] was designed to protect" (Johnson v. Railway Express Agency, Inc., --- U.S. ---, 95 S. Ct. 1716, 1723-1724, 44 L.Ed.2d 295, 305-306 (May 19, 1975)).

The purposes for which Congress designed the ADEA's Section 7(d) notice requirement are not difficult to ascertain. Because the ADEA and Title VII of the Civil Rights Act of 1964 (hereinafter, Title VII)[3] have certain common origins[4] and extensive

3. Act of July 2, 1964, Public Law 88-352, 78 Stat. 253, as amended; 42 U.S.C. 2000e-1 et seq.

4. See Section 715 of Title VII, 78 Stat. 265, in 42 U.S.C.A. 2000e-14 Note (1974). See also 110 Cong. Rec. 2596-2599 (Feb. 8, 1964) (House) and 9911-9913 (May 4, 1964), 13490-13492 (Jun. 11, 1964) (Senate), debates on the inclusion in Title VII of "age" as a proscribed factor of employment.

parallel language, the courts frequently look to Title VII in the process of interpreting the ADEA. See, e.g.: Curry v. Continental Airlines, 513 F.2d 691 (C.A. 9, 1975); Laugesen v. Anaconda Co., 510 F.2d 307 (C.A. 6, 1975); Wilson v. Sealtest Foods Division of Kraftco Corp., 501 F.2d 84 (C.A. 1974); Goger v. H.K. Porter Co., Inc., 492 F.2d 13 (C.A. 3, 1974). By analogy, therefore, it is clear that the ADEA's notice requirement, like the so-called "charging" requirement of Title VII from which it was adapted,[5] serves two important basic purposes. "First, it notifies the charged party of the asserted violation. Secondly, it * * * permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law" (Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (C.A. 7, 1969); quoted with approval in Williams v. General Foods Corp., 492 F.2d 399, 404 (C.A. 7, 1974); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1092 (C.A. 6, 1974); Evans v. Sheraton Park Hotel, 503 F.2d 177, 183 (C.A.D.C. 1974). Accord: Graniteville Co. (Sibley Division) v. EEOC, 438 F.2d 32, 38 (C.A. 4, 1971), and Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (C.A. 5, 1970).

It is undeniable that the basic purposes of the 180-day limitation period were fully satisfied in this case. Defendant was given every opportunity to effect voluntary compliance. It

5. Section 706(e) (formerly Section 706(d), 78 Stat. 260), as amended by the Equal Employment Opportunity Act of 1972, Act of March 24, 1972, Public Law 92-261, Sec. 4(a), 86 Stat. 105; 42 U.S.C. 2000e-5(e).

knew of the ongoing investigation at the Department of Labor. As we intend to develop at the evidentiary hearing sought, it deliberately caused its "captive" Dancer-Fitzgerald,to hire plaintiff so as to prevent bringing of this action. It asked for a 30-day extension when charged with willfulness. Defendant RJR had ample opportunity to conciliate as a result of the original complaint and during the course of the DOL's 16 month investigation, in which it knowledgably participated.

In these circumstances, defendant RJR was afforded all of the "protection" contemplated by the Act's notice requirement provided in Section 7(d). It had, to use the language of the Supreme Court in Johnson v. Railway Express Agency, supra, --- U.S. at n. 14, 95 S. Ct. at 1724, 44 L.Ed.2d at 306, "the opportunity to protect itself against the loss of evidence, the disappearance and fading memories of witnesses, and the unfair surprise that could result from a sudden revival of a claim that long has been allowed to slumber." Indeed, in view of the Labor Department's extended efforts to investigate,and indeed conciliate Davis' claim, the defendant received far more notice of the asserted violation and a far greater opportunity to settle it through informal methods than Congress ever intended to require as a prerequisite to the maintenance of a private ADEA action.

While, arguably, there may be cause for dismissing a private ADEA action where the Labor Department fails to act promptly on a complaint, which is filed within the time limits specified in

Section 7(d) but which does not technically qualify as a "notice of intent to sue," that was not the case here.

Congress expressly "intended that the responsibility for enforcement vested in the Secretary by Section 7, be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion,and formal methods applied only in the ultimate sense" (H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), p. 5; reprinted in 1967 U.S. Code Cong. & Admin. News 2213, 2218 (emphasis added)). See virtually identical language in S. Rep. No. 723, 90th Cong., 1st Sess. (1967) at p. 5; reprinted in 113 Cong. Rec. 31250 col. 3 (Nov. 6, 1967). In the instant case, this Congressional directive was followed under the given fact pattern as existed.

It is thus clear, as it can be more fully developed at the evidentiary hearing sought, that, except for the technicality of having in hand a formal "notice of intent to sue," Davis fully and promptly complied with the requirements of Section 7(d) in the instant case. This, however, did not impress the lower court. In its view, the humanitarian and remedial purposes of the ADEA are outweighed by the policy of the Act to give employers prompt notice of their status as potential defendants. This approach cannot be squared with the Supreme Court's statement in Burnett v. New York Central Railroad Co., supra, 380 U.S. 424, concerning the Federal Employers' Liability Act, that "the humanitarian purpose of the [Act] makes clear that Congress would not wish a plaintiff

deprived of his rights when no policy underlying a statute of limitations is served in doing so" (id., at 434).

In part, the lower court relied heavily upon Powell v. Southwestern Bell Telephone Company, 494 F.2d 485, (5th Cir. 1975) and Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975).

It is evident, however, that the Fifth Circuit itself does not read Powell as foreclosing any and all tolling of the Section 7(d) notice period. Judge Simpson, who authored Powell, also wrote the decision in Edwards v. Kaiser Aluminum & Chemical Sales, 515 F.2d 1195 (Fifth Cir. 1975), where he expressly pointed out that the "interests" which the notice requirement were designed to advance -- "the promotion of informal, good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources" -- could be protected through tolling in appropriate circumstances. Such tolling was found to be unwarranted in Edwards, however, "because of [Edwards'] failure to file within 180 days of discharge, of hiring his first attorney, or of actual knowledge". But we argue, such tolling would apply here because of RJR's acts in causing Davis' employment by Dancer-Fitzgerald and its subsequent request for a 30 day extension of time. Moreover, its move from New York to North Carolina, with all its records, further delayed Davis' requests of conciliation and the DOL's investigation of the charges of willful discharge.

In these circumstances, the lower court should have accepted plaintiff's complaint to the Labor Department as tolling the 180-day notice requirement of ADEA Section 7(d)(1), and his counsel's subsequent formal notification (filed 216 days after the alleged discriminatory act) as curing any procedural defects. Its refusal to do so, we repeat, is a meaningless triumph of form over substance.

But, we argue, such tolling would apply here because

a) discharge took place on October 6, 1972, as evidenced by the exhibits

b) the defendant itself, by its own request for extension of time to respond to the DOL's inquiry, after the expiration of 2 years from Oct. 6, 1972, recognized the applicability of the 3 year statute;

c) the report of the DOL's investigation showed that a willful violation existed;

d) the Department of Labor's solicitor recognized that a willful discharge took place, even though he pointed out the difficulty in proving willfulness (which we say goes to the extent of proof and not the fact itself);

e) the DOL's investigator recognized the applicability of the 3 year statute, as did the solicitor, who subsequently changed his mind; and

f) the inordinate length of time (16 months), to process plaintiff's complaint.

When we ask for an evidentiary hearing, at which we can flesh out the above, we are not requesting anything novel. This has been done before, and indeed is before the court in this district in an EEOC case (Lucido Cravath, Swaine & Moore, Southern District, New York).

For example, in Dartt v. Shell Oil Company, 9 EPD para. 10205 (N.D. Okla. 1975), the discharged employee was afforded two evidentiary hearings to develop her charge of unlawful discriminatory discharge. After she developed her evidence at these two hearings, the district court went on to hold that notwithstanding the facts brought forth, it still followed that line of cases which held that the 180-day filing with the Secretary of Labor is a mandatory jurisdictional prerequisite.

However, the district court was reversed by the Court of Appeals, Tenth Circuit (No. 75-1277, (74C-221, ___ F.2d ___).

In its reversal of the district court, the Court of Appeals examined all the cases and legislative history and still "remained unconvinced that Congress intended the failure to file notice within the 180-day notice period to be an absolute bar to bringing an ADEA private action."

Supporting its holding that compliance with Section 626(d)(1) is not a jurisdictional prerequisite, the Court of Appeals relied upon analogous provisions of Title VII of the Civil Rights Act of 1964. It concluded that the language in many of the cases which

held that such notice was jurisdictional left room open for a further interpretation, premised upon the facts of the particular case. Even Powell v. Southwestern Bell Telephone Company, 5 Cir., 494 F.2d 485, relied upon by the court below here, made such provision.

> "Thus, it appears that even though the Fifth Circuit was the first court of appeals to label section 626(d)(1) requirements as jurisdictional, Powell, supra, it has left the door open for possible equitable modification of the 180 day period. This conclusion is further supported by the Fifth Circuit's determination that the analogous time limitation in Title VII is not jurisdictional, but subject to modifications."

In its opinion in Dartt, the Court said:

> " ... The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment. Moses, supra, at 93; Skogland, supra at 801. Additionally, strict compl nce with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights. Skogland, supra at 801; Woodford v. Kinney Shoe Corp., N.D. Ga., 369 F. Supp. 911, 915. See also Love v. Pullman Co., 404 U.S. 522, 527; Reeb, supra at 928.
>
> We do not contend that a filing of a notice of intent to sue is not a condition precedent to an action under the ADEA. However, the similarities between Title VII and the ADEA, the liberal reading of analogous time limitations in Title VII, the overly broad usage of the term "jurisdictional" by courts interpreting section 626(d) of the ADEA, the remedial nature of the legislation, and the lack of legal training and guidance for many of the ADEA complainants lead us to conclude that while section 626(d)(1)'s notice of intent-to-sue requirement cannot be waived, the 180-day time limitation

should be interpreted as being subject to possible tolling and estoppel. (Citing cases).

Dartt, supra makes the point that equitable consideration should be extended to persons unsophisticated in the intricacies of the applicable timetables. While it is true that Davis is an attorney, it is also true that he was admitted to the bar 25 years ago and has never practiced. This Court can readily come to the conclusion that an attorney not in the practice on a day to day basis, is suffering under the same disadvantages as any other layperson, in matters of this kind.

However, that cannot be done in this case, for the reason that we have urged. To get to the merits of the case, an evidentiary hearing is required.

We now come back to the initial filing requirement within 180 days, and the institution of suit within 3 years in the event of a willful discharge.

In Borman v. Long Island Press Publishing Co., Inc., 379 F. Supp. 951 (E.D. New York 1974), the defendant moved to dismiss the plaintiff's complaint, pursuant to Rule 12(b)(1). In denying the motion to dismiss the Court held

> "In the case at bar, the defendant urges the two year limitation protection and the plaintiff urges the three year exception because of a willful violation of the Act. The Court cannot decide this issue of willfulness, if any, without first taking appropriate proof in open court. Therefore, the Court will defer any such ruling until such proof, if any, is presented during the trial."

To the same effect, see Wirtz, Secy. v. Handy, 279 F.Supp.

265 (S.D. Fla. 1967).

cf. Hodgson Secy. v. Ideal Corrugated Paper Box Company, E.P.D. para. 9805 S.D. West Virginia 1974).

We submit, that Powell v. Southwestern Bell Telephone Company, supra, relied on by the district court in support of defendant's motion to dismiss, supports plaintiff's request that no action be taken on the motion until an evidentiary hearing is had. We have submitted the plaintiff's version of the facts. Defendant has submitted its version. Conflict exists. The time-table of events is challenged by defendant. In Powell v. Southwestern Bell Telephone Co., the Court affirmed the basic doctrine

> "A motion to dismiss a complaint should not be granted if material issues are unresolved."

We argue that indeed, such issues are unresolved and for that reason, amongst others, the motion should not be granted at this time.

It is settled law that where, as in the instant case, the defendant has moved to dismiss on the pleadings, "the allegations of the complaint and supporting affidavits are [accepted as] true" (Gardner v. Toilet Goods Association, Inc., 387 U.S. 167, 172 (1967)); Marlow v. Fisher Body, 489 F.2d 1057, 1063 (C.A. 6, 1973). Furthermore, "the complaint will be construed liberally" (L'Orange v. Medical Protective Co., 394 F.2d 57, 59 (C.A. 6, 1968)) and all factual allegations viewed "in the light most favorable to the plaintiff" (Lucarell v. McNair, 453 F.2d 836, 837 (C.A. 6, 1972)). See also Hilliard v. Williams, 465 F.2d 1212, 1214 (C.A. 6, 1972), cert den. 409 U.S. 1029.

B

The legislative history before the Congress supports Davis' request for an evidentiary hearing. Viewed against such history, we submit that the court below erred as a matter of law in dismissing plaintiff's complaint, based on the pleadings, since were extenuating circumstances sufficient to warrant extension, on equitable grounds, of the time limitation established by Section 7(d)(1) of the ADEA.

In Laugesen v. Anaconda Co., 510 F.2d 307 (C.A. 6, 1975), the Court observed that, although the ADEA was in substantial part patterned after Title VII[6] (id., at 311), it is nonetheless "embodied in a separate act and has its own unique history" which "counsels the examiner to consider the particular problems sought to be reached by the statute" (id., at 312).

6. Act of July 2, 1964, P.L. 88-352, 78 Stat. 253, as amended; 42 U.S.C. 2000e-1 et seq.

In moving to dismiss the complaint, which clearly stated a cause of action under the ADEA, defendant challenged plaintiff's allegation "that such notice of intention to sue, as could be given, was given to the Secretary of Labor (Am.Complt, para. 31, App. A30). We submit, however, that timeliness of notice to the Secretary is to be ascertained, not from the date of the unlawful act, but from the date on which plaintiff discovered or could reasonably be expected to discover that his rights under the Act had been violated,and that can be verified only by the evidentiary hearing sought.

As this Court recognized in Harris v. Walgreen's Distribution Center, 456 F.2d 588, 592 (C.A. 6, 1972), the various time limitations for filing under Title VII may be extended on general equitable grounds where there is a showing of sufficient justification. Accord: Gates v. Georgia-Pacific Corp., 492 F.2d 292, 295 (C.A. 9, 1974); Huston v. General Motors Corp., 477 F.2d 1003, 1007 (C.A. 8, 1973); Stebbins v. Nationwide Mutual Insurance Co., 469 F.2d 468, 469 (C.A. 4, 1972), cert. den., 410 U.S. 939. Indeed, the EEOC, in determining the timeliness of a charge under Title VII, has ruled that the date of the alleged unlawful practice includes the date the complaining individual actually knew or had reason to believe that he was the victim of illegal discrimination. See e.g., Decision No. 71-646, reported in 3 F.E.P. 386 n. 1, CCH EEOC Decisions para. 6207. The soundness of this principle is obvious, in light of the recognized facts that employment discrimination

"will seldom be admitted by an employer" (Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157, 1162 (C.A. 8, 1971)), and that the aggrieved employee "may have precise knowledge of the facts concerning the 'unfair thing' done to him, yet not be fully aware of the employer's motivation for perpetrating the 'unfair thing'" (Sanchez v. Standard Brands, Inc., 431 F.2d 455, 462 (C.A. 5, 1970).

To hold otherwise would inevitably permit innumerable discriminatory acts to go wholly uncorrected. This would be especially true in ADEA cases, since the Act "prohibits a particularly subtle form of discrimination" (Surrisi v. Conwed Corp., 510 F.2d 1088, 1090 (C.A. 8, 1975)) and only rarely will discrimination against an older, and, often, once valued, worker be so immediately apparent as is discrimination based on race or sex. A case illustrating this is Hodgson v. First Federal Savings and Loan Ass'n of Broward County, 455 F.2d 818 (C.A. 5, 1972), where an applicant for employment would never have known that she had been rejected solely because of her age if the Labor Department had not, on its own, conducted a routine general investigation of the employer. As it was, 116 days had elapsed before the applicant was first apprised of her cause of action under the ADEA. See the district court's decision reported at 3 F.E.P. 16, 17, 3 E.P.D. para. 8066 (S.D. Fal. 1970).

Viewed in this context, we submit that Davis has shown circumstances warranting extension of the time limitation contained

in Section 7(d)(1) of the ADEA, and that this was sufficient to withstand a motion to dismiss on the pleadings. At the very least, the district court should have examined, in light of the ADEA's remedial and humanitarian intent, the reasons offered by plaintiff for the delayed filing. In so doing, the court should have considered the fact that the Labor Department had determined that the matter was sufficiently fresh to warrant a full investigation and conciliation effort over a period of 16 months, and that the defendant neither claimed nor showed any prejudice resulting from the delay.[7]

Accordingly, this case should be remanded to the court below for consideration of the extenuating circumstances resulting in plaintiff's delay, to be developed after the evidentiary hearing sought. If, on remand after the hearing, sufficient justification is found to warrant extension of the notice-filing period, Section 7(b) of the Act clearly provides the jurisdictional basis which

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7. As the Fifth Circuit stated in Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1015 n. 6 (C.A. 5, 1971), with regard to the analogous Title VII charging requirement:

> The 90-day [now 180- day] requirement seems to be directed toward ensuring that the Commission expend its conciliation resources on alleged unlawful employment practices which are reasonably current. However, once the Commission has determined that the practices complained of are current, and that the charging party has been adversely affected thereby, and it has actually committed its resources to the conciliation process, that determination logically should be open to jurisdictional challenge only on the ground that it was without a rational basis.

the court below erroneously thought to be lacking. As that subsection expressly provides: "In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act * * * " (emphasis added). In the circumstances of this case, equitable considerations require, we submit, that plaintiff be given his day in court and not subjected to the same procedural delays and difficulties "which plague[d] so many agencies and the people who seek their assistance, such as the EEOC and the NLRB" (113 Cong. Rec. 7076) and which Congress, in enacting the ADEA, sought to avoid by adopting the enforcement procedures of the Fair Labor Standards Act.

POINT II

A

THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT BECAUSE THERE IS NO REQUIREMENT THAT AN AGGRIEVED PERSON PURSUE STATE REMEDIES PRIOR TO FILING SUIT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

This is only one of the more recent in a growing line of cases where persons claiming that they were unlawfully discharged on account of their age have had their federal ADEA suits dismissed by the district courts for lack of jurisdiction on the ground that they did not first initiate proceedings with a state agency, even though they had followed all of the steps prescribed by Section 7 of the Act (29 U.S.C. 626) as jurisdictional prere-

quisites for filing suit. The same result was reached in Goger v. H.K. Porter Co., Inc., 5 E.P.D. para. 8562, 5 F.E.P. 695 (D. N.J. 1973), vacated and remanded, 492 F.2d 13 (C.A. 3, 1974); McGarvey v. Merck & Co., Inc., 359 F.Supp. 525 (D. N.J. 1973), vacated and remanded, 493 F.2d 1401 (C.A. 3, 1974) (unpublished per curiam memorandum decision), cert. den. sub nom. Merck & Co., Inc. v. McGarvey, 43 U.S.L.W. 3209 (Oct. 15, 1974); Garces v. Sagner International, Inc., not yet reported (D. P.R. Dec. 2, 1974, Civ. Action No. 74-1114, app. pndg. C.A. 1, No. 75-1044); and Vaughn v. Chrysler Corp., 382 F.Supp. 143 (E.D. Mich. 1974).

In dismissing this action for lack of subject matter jurisdiction, the court below expressly relied upon the majority opinion of the Third Circuit in Goger v. H.K. Porter Co., Inc., supra, 492 F.2d 13. The central issue in Goger, as in the instant case, was whether Section 14(b) of the ADEA (29 U.S.C. 633(b)) requires an aggrieved person to commence proceedings with an appropriate state agency prior to instituting suit under the Act in a federal district court. A divided panel of the Third Circuit held, inter alia, that such initial deferral was a statutory requirement. We submit that Goger was incorrectly decided in this respect, and that the court below should have denied defendant's motion to dismiss for the reasons stated in Judge Garth's concurring opinion.

The Goger majority rested its decision on the similarity

which it saw between Section 14(b) of the ADEA and Section 706(c) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(c)).[8]

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8. Act of July 2, 1964, P.C. 88-352, Sec. 706(b), 78 Stat. 259 (formerly 42 U.S.C. 2000e-5(b)), as amended by the Equal Employment Opportunity Act of 1972, Act of March 24, 1972, P.L. 92-261, Sec. 4(a), 86 Stat. 103. Under the 1972 Amendments, Section 706(b) became Section 706(c). Section 706 provides, in pertinent part, as follows:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.
>
> (d) In the case of any charge filed by a member of the Commission * * * the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

The Title VII provision has been construed to require that appropriate state agencies be given a prior opportunity to consider discrimination claims before a charge is filed with the federal Equal Employment Opportunity Commission (EEOC). See, e.g., Love v. Pullman Co., 404 U.S. 522 (1972). Based on the Title VII decisions, and on what the majority in Goger characterized as the "common origin" of these two statutes, the Third Circuit concluded that initial deferral to a state agency was also a jurisdictional prerequisite to instituting a private ADEA action.

The majority opinion, in Goger, failed to recognize, as did the court below here, that despite certain similarities in language, the federal age discrimination law "is embodied in a separate act and has its own unique history [which] at least counsels the examiner to consider the particular problems sought to be reached by the statute" (Laugesen v. Anaconda Co., 510 F.2d 307. Although Congress incorporated many of the Title VII remedial prohibitions which had been included in the Administration's age discrimination bill, it specifically rejected the proposed administrative agency and enforcement procedure, which were analogous to the EEOC and Title VII. Compare the original (i.e., Administration) version of S. 830, 90th Cong., 1st Sess. (1967), in 113 Cong. Rec. 2794-2796. The primary reason for such rejection, as explained by Senator Javits, (p. 33, 38, this brief) was that the approach contemplated in the Administration

bill would cause the same delays "which plague so many of our agencies such as the EEOC and the NLRB. * * * By utilizing the courts rather than [administrative bodies] as the forum to hear cases arising under the law, these delays may be largely avoided." Such delays were felt to be "particularly" unfortunate "in the case of older citizens to whom, by definition, relatively few productive years are left" (Statement of Senator Javits in Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, on S. 830, S. 788, 90th Cong., 1st Sess. at 24 (1967), reprinted in 113 Cong. Rec. 7076).

Viewed in this legislative context, and bearing in mind the Congressional concern to avoid the delays occasioned by administrative proceedings, as well as the different structure of the two statutes, it is readily apparent that the Title VII enforcement procedures cannot be fairly equated with those of the ADEA. To the contrary, the ADEA is a self-contained statute which incorporates the enforcement techniques of the Fair Labor Standards Act of 1938 (29 U.S.C. 209, 211, 216(b) and (c), 217) "with appropriate modifications necessary to accomodate them to the purposes of this legislation." S. Rep. No. 723, 90th Cong., 1st Sess. at 13-14 (1967) (individual views of Sen. Javits).

Accordingly, we submit that the majority decision in Goger mistakenly compared Section 14(b) of the ADEA and Section 706(c) of Title VII. These two sections are not parallel provisions.

Section 706 of Title VII sets forth procedural steps and time tables which an aggrieved person must follow before filing suit to enforce rights protected under that act. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). The comparable provision in the ADEA is Section 7, not Section 14, since it is Section 7 which sets forth the jurisdictional prerequisites for filing suit. Significantly, unlike Section 706 of Title VII, Section 7 does not make the filing of an administrative charge with the appropriate State agency a jurisdictional step. Its only requirement in the case of an aggrieved individual is that the Secretary of Labor be afforded timely notice of an intent to file suit. See Powell v. Southwestern Bell Telephone Company, 494 F.2d 485, 488 (C.A. 5, 1974). The sole purpose of this requirement is to enable the Secretary to eliminate the alleged violation through informal methods of conciliation, conference and persuasion, if that is possible, before suit is filed, and to ensure that the Secretary expends his conciliation resources only on alleged unlawful practices which are reasonably current.

In contrast, Section 14 of the ADEA does not set forth any jurisdictional steps for instituting suit, but deals solely with the relationship between Federal and State laws. Thus, although

Section 14 borrows language from Section 706(c) of Title VII, this language, when removed from the jurisdictional placement which it has in Title VII and also from the companion section which requires initial deferral to State agencies even where the EEOC itself initiates the charge (Section 706(d), 42 U.S.C. 2000e-5(d)),[9] contains no suggestion that resort to State law is a jurisdictional prerequisite to the filing of an ADEA action. This language simply states that "no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated * * *." Under the plain meaning of these words, the limitation upon the right to file suit under the ADEA would be applicable only if proceedings had already been initiated under existing State law. However, nothing in this language says that State proceedings must first be initiated, i.e., that a plaintiff must first attempt to utilize available state remedies, before filing suit under the ADEA. Indeed, such a requirement would be inconsistent with the Congressional concern to eliminate the delays occasioned by administrative proceedings which other discriminatees had encountered in bringing their cases to the courts under Title VII.

Not only is there nothing in the language of the ADEA to require this result, but the stated purpose of Section 14 (as

9. Under the ADEA, on the other hand, it is clear beyond question that nothing similarly requires the Secretary of Labor to defer to State agencies prior to filing an age discrimination suit under the Act.

indicated by its heading, "FEDERAL-STATE RELATIONSHIP," and by its placement at the end of the Act just before the "EFFECTIVE DATE" and "APPROPRIATIONS" provisions (Sections 15 and 16 (29 U.S.C. 634 and 635)) is to preserve concurrent Federal and State jurisdiction in the area of age discrimination.[10] Thus, Section 14(a) (29 U.S.C. 633(a)), for which there is no comparable provision in Title VII, provides that: "Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action." Pointing to this provision, Judge Garth stated in his concurring opinion in Goger that:

> "...The various dissimilarities between the two Acts (and in particular the presence of § 633(a)[1] in ADEA, which has no counterpart in Title VII) impel me to the conclusion that there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act...
>
> ...There is no requirement (in this

10. As pointed out in both the Senate and House Reports, a Department of Labor survey conducted in 1963 disclosed that 24 States and the Commonwealth of Puerto Rico had age discrimination legislation similar to the bills pending before Congress in 1967, but that their effectiveness was difficult to measure accurately. S. Rep. No. 723, 90th Cong., 1st Sess. at 2-3 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess. at 2-3 (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2213, 2215. The legislative reports also noted that "in a canvass of State officials regarding the advisability of Federal action against employment discrimination on account of age, most operating officials perceived advantages in a national policy against such discrimination" (Ibid.).

> language) however, that such State proceedings must first be initiated - i.e., that a complaint be made to the appropriate State agency - before suit may be filed under the (Federal ADEA) ...
>
> In support of that construction the Secretary of Labor asserts that the sole Congressional purpose underlying the enactment of 29 U.S.C. §633(b) was to give the State time to act on a complaint if an aggrieved individual chose to proceed there first. (That choice might well be made by a complainant if a State affords a greater remedy against age discrimination or imposes prohibitions against age discrimination greater or stricter than those provided under Federal law.[2])...
>
> ...I do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under §633(b), need not be concluded and which in any event would be superseded by the filing of the Federal action under §633(a)."

This construction of the plain statutory language is confirmed by the legislative reports which, in summarizing Section 14 of the ADEA, stated only that the section "provides for concurrent Federal and State actions, except that in States having laws prohibiting discrimination in employment because of age, no suit may be brought under this act before the expiration of 60 days after proceedings have been commenced under the State law * * * unless such proceedings have been earlier terminated, and commencement of an action under this act shall be a stay on any State action previously commenced." S. Rep. No. 723, 90th Cong., 1st Sess. at 6 (1967), reprinted in 1967 U.S. Code Cong. & Admin. News at 2218-2219.

In a similar vein, former Secretary of Labor W. Willard Wirtz, in a prepared response to questions submitted by Senator Javits, noted that the preservation of the jurisdiction of state agencies in Section 14 was designed to allow such agencies to impose prohibitions against age discrimination in employment stricter than those provided under the Federal law. Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, on S. 830, S. 788, 90th Cong., 1st Sess. at 48 (1967).

Subsequently, during debate on the bill, Senator Javits, in addressing "the question of any conflict which might develop in the administration of the law as related also to the Civil Rights Act of 1964" (i.e., Title VII) stated that "[t]he laws will operate completely independently of each other, as will the enforcement procedures" (113 Cong. Rec. 31255, emphasis added). Senator Yarborough, Chairman of the Subcommittee on Labor as well as the floor manager and prime sponsor for the Senate bill, expressly concurred in Senator Javits' remarks (ibid.).

The legislative history of the ADEA is thus devoid of any indication that Congress intended to restrict an individual's right to file suit under the federal law to cases in which proceedings had first been commenced under state law, and this indication cannot be supplied by looking at the legislative history of Title VII. Not only is the legislative history of these two statutes

different,[11] but the intent of Section 14(b) of the ADEA and Section 706(c) of Title VII, although they use comparable language, is, as we have shown above, also different. So far as the ADEA is concerned, the sole Congressional purpose underlying the enactment of Section 14 was to give the State time to act on a complaint if the aggrieved individual chose to proceed there first. To hold otherwise would be to create a procedural pitfall for unsuspecting individuals which could easily serve, as it did in the instant case (as well as in Goger, McGarvey, Vaughn and Sagner supra,) to deprive aggrieved individuals of their day in court, thereby thwarting the objective of this remedial legislation, whose declared purpose, as stated in Section 2(b) of the Act (29 U.S.C. 621(b)), is "to promote the employment of older workers based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment." See Hodgson v. First Federal Savings & Loan Association of Broward County, 455 F.2d 818, 820 (C.A. 5, 1972). See also, S. Rep. No. 723, 90th Cong., 1st Sess. at 1-2

11. Although Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c), has been uniformly construed to require primary resort to State procedures, this construction accords with the section's legislative history which, unlike the ADEA, clearly shows that Congress intended the appropriate State agencies to be given the first opportunity to redress unfair employment practices covered by Title VII. See EEOC v. Union Bank, 408 F.2d 867, 869-870 (C.A. 9, 1968) and the court's statement in DuBois v. Packard Bell Corp., 470 F.2d 973, 975 (C.A. 10, 1972), that "if the legislative history of Title VII were not so manifestly clear as to remove all doubt, the liberal interpretation accorded remedial legislation might leave some room for argument as to the meaning" of the deferral provision.

(1967); H.R. Rep. No. 805, 90th Cong., 1st Sess. at 1-2 (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2213-2214).

B

Even if the commencement of proceedings with an appropriate state agency is a jurisdictional prerequisite to filing a private suit under the ADEA, the order below should be vacated and the case remanded with instructions to retain jurisdiction for a sufficient time to permit plaintiffs to institute such proceedings. Our basic position is that the commencement of state proceedings is not a jurisdictional prerequisite to filing suit under the Federal ADEA. But even if the district court's ruling to the contrary is correct, its order should be vacated and the case remanded with instructions that it be reinstated and held in abeyance until plaintiff has had sufficient time to seek redress through the appropriate state agency. Any other disposition of the case would cause inequitable and unwarranted hardship for Davis, who attempted to invoke his rights under the ADEA by doing all that is required of under the express provisions of Section 7 of the Act within the known facts then at his command. We submit that Davis should not, as a result of proceeding in accordance with the U.S. Department of Labor's position regarding Section 14(b), and be barred from the opportunity to seek enforcement of his rights in the federal court.

Ample authority for this disposition of the case exists in the decisions handed down under Title VII of the Civil Rights Act of 1964. Particularly pertinent is Crosslin v. Mountain States

Telephone & Telegraph Co., 1 BNA Fair Employment Practices Cases 802, 2 CCH Employment Practices Decisions para. 10,041 (D. Ariz. 1969, not otherwise reported), reversed and remanded, 400 U.S. 1004 (1971), which involved the EEOC's practice of refusing to refer charges to state agencies whose enforcement powers or activities it deems inadequate.[12] The plaintiff there had filed a charge with the EEOC alleging that the defendant had refused to consider her for employment because of race. Based on its opinion that the Arizona Civil Rights Commission was not authorized "to grant or seek relief" from the alleged discrimination within the meaning of Section 706 of Title VII, the EEOC did not refer the charge to the State Commission but instead proceeded with its own investigation. As a result of the investigation, the EEOC found reasonable cause to believe that the defendant had violated Title VII, and accordingly notified the plaintiff of her right to sue. Upon institution of her suit, defendant moved to dismiss the com-

12. The same Puerto Rico statute which bars employment discrimination on the basis of "race, color, creed, [or] sex" also bars discrimination on the basis of "age." 29 L.P.R.A. 146. Significantly, the EEOC's "provisional" designation of the Commonwealth of Puerto Rico Department of Labor as a State agency to which charges are deferred, pursuant to Section 706(c) and (d) of Title VII, was withdrawn by recent amendment to the Code of Federal Regulations. See 29 C.F.R. 1601,12(m); 40 Fed. Reg. 3211 (Jan. 20, 1975), amending former 29 C.F.R. 1601.12(k)-I (1974 ed.). Consequently, the EEOC no longer refers Title VII charges to the Commonwealth of Puerto Rico Department of Labor, nor does it require that aggrieved individuals initially seek redress through that State agency. This determination of non-qualification by the EEOC is, of course, "entitled to great deference" (Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971)).

plaint on the ground that the court lacked jurisdiction because a charge had not first been presented to the State commission as required by Section 706. The district court denied the motion, holding that the State Commission was not authorized to grant or seek adequate relief and that deferral by the EEOC to that agency was therefore not required. The Ninth Circuit reversed and remanded with instructions to dismiss the complaint, holding that the district court was without jurisdiction to consider the plaintiff's claim. The plaintiff then filed a petition for certiorari.

In an amicus brief filed at the invitation of the Supreme Court, the Solicitor General suggested that the case be remanded to the district court with instructions that it retain jurisdiction so that the plaintiff could institute appropriate State proceedings. The Supreme Court granted the plaintiff's petition, vacated the judgment, and ordered the case remanded to the district court "for reconsideration in light of the suggestions contained in the brief of the Solicitor General * * *."

Following the Supreme Court's Crosslin decision, two courts of appeal have reversed dismissals of Title VII actions, which dismissals had been based on either the plaintiff's or the EEOC's failure to notify the appropriate state agency. In each case, the court of appeals instructed the district court to retain jurisdiction until the procedural defect was remedied. See Mitchell v. Mid-Continent Spring Co., 466 F.2d 24 (C.A. 6, 1972), cert. den. 410 U.S. 928; and Oubichon v. North American Rockwell Corp., 482

F.2d 569 (C.A. 9, 1973), holding that " in cases where the state agency has been bypassed, the district court should retain jurisdiction for a period sufficient to allow the employee to seek redress through the state agency" (id. at 571). Indeed, the Ninth Circuit only recently had occasion to reaffirm this principle in EEOC v. Wah Chang Albany Corp., 499 F.2d 187 (C.A. 9, 1974), noting also that "deferral is not a jurisdictional fact in the sense that its absence deprives the court of power to act" (id. at 189, n. 3).

We submit that the plaintiff here, no less than the plaintiffs in the above Title VII cases, made a reasonable and good faith effort to protect and pursue his rights under the federal law prohibiting discrimination in employment based on age. Nothing he did or failed to do has prejudiced defendant in any way. On the contrary, it is the plaintiff who has been prejudiced by his reliance on the U.S. Department of Labor's position with respect to Section 14(b) of the Act, inasmuch as the DOL could not reach a satisfactory settlement or conciliation for 16 months. Plaintiff was then able to start action as he did.

In these circumstances, we submit, that the fact that plaintiff did not commence proceedings with the appropriate state agency prior to filing this ADEA suit does not justify barring ultimate determination in the federal courts of the substantive merits of this age discrimination complaint.

CONCLUSION

The order of dismissal of the court below should be reversed with a direction mandating an evidentiary hearing. In addition, this court should find that there is not a prior requirement of a state hearing; if however, this court thinks that such state hearing is required, then its order herein should retain jurisdiction in the federal court, pending such hearing.

Dated: New York, New York
January 28, 1977

Respectfully submitted,

Colman & Liner
Attorneys for Plaintiff-Appellant

Of Counsel

Leon Liner
Milton A. Chambers
Robert Liner

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Murray H. Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 55 E 10th St NY NY 10003.

That on the 28th day of January, 1977, deponent personally served the within Brief for John D. Davis, Plaintiff-Appellant upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing xxxxxxx true copies of same enclosed in a post paid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

Davis Polk & Wardwell
Attorneys for Defendant-Appellee
1 Chase Manhattan Plaza
New York, New York

Murray H Berman

Sworn to before me this
28th day of January, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977